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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 570

WILLIAM P. ROBINSON, JR., Commissioner of Education of the State of Rhode Island, RAYMOND H. HAWKSLEY, General Treasurer of the State of Rhode Island, and CHARLES W. HILL, Controller of the State of Rhode Island, *Appellants,*

v.

JOAN DICENSO, DONALD R. HILL, ANN CLANTON, ALICE CHASE, HELEN KING and MARIE FRIEDEL, *Appellees.*

**On Appeal From a Three-Judge United States District Court for the District of Rhode Island**

## BRIEF OF APPELLANTS

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**On Appeal From a Three-Judge United States District Court for the District of Rhode Island**

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## BRIEF OF APPELLANTS

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### OPINION BELOW

The opinion of the United States District Court for the District of Rhode Island is reported at 316 F.Supp. 112 (1970). It is reprinted in full starting at page 28 of the Joint Appendix (J.A.).

## JURISDICTION

The Judgment of the District Court was entered on June 17, 1970. J.A. 50-51. The appellants filed their Notice of Appeal in the District Court on June 26, 1970. J.A. 53-54. Probable jurisdiction was noted by this Court on November 9, 1970. The jurisdiction of this Court to hear this case on direct appeal is based upon 28 U.S.C. § 1253.

## CONSTITUTIONAL PROVISIONS INVOLVED

### First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTE INVOLVED

The Statute involved in this Appeal is a Rhode Island Statute entitled: "An Act Providing Salary Supplements to Non-Public School Teachers." (Rhode Island General Laws, Title 16, Chapter 51.) (Here-

inafter sometimes referred to as the Salary Supplement Act.)

The Statute is reprinted at J.A. 182.

## QUESTION PRESENTED

Does the Rhode Island Salary Supplement Act violate the Establishment Clause of the First Amendment because teachers in parochial schools may qualify for and receive benefits under the Statute?

## STATEMENT OF THE CASE

This action was brought by a group of individuals, each of whom is a resident citizen and taxpayer in the United States and in the State of Rhode Island, to enjoin the Commissioner of Education of the State of Rhode Island, the General Treasurer of the State of Rhode Island, and the Controller of the State of Rhode Island from making salary supplement payments to teachers in non-public elementary schools pursuant to C246 of the Rhode Island Public Laws of 1969, Rhode Island General Laws, Title 16, Chapter 51, commonly referred to as the Salary Supplement Act.

The complaint in substance alleges that the Act violates both the Establishment and Free Exercise Clauses of the First Amendment of the Constitution of the United States because it permits public funds to be used to supplement the salaries of certain teachers of secular subjects in non-public schools; that Catholic schools are the prime beneficiaries of the Act; that the purpose and primary effect of the Act is the advancement of religion, and prays that the Act be declared unconstitutional and that the defendants be

enjoined from making the payments authorized by the Act.

The legislative findings contained in the first section of the Act recite Rhode Island's long concern with the quality of the education provided for all of its youth; that the State had earlier provided legislation to partially finance the cost of public schools for local cities and town; that non-public schools by reason of accelerating costs were finding it extremely difficult to maintain the quality of education; that approximately twenty-five (25%) percent, or 45,000, of the total number of its students at the elementary level were being educated in non-public schools and that a crisis existed in non-public schools; that non-public schools were finding it increasingly difficult to maintain adequate salary scales and that

> ". . . . without adequate salary scales, no school can attract sufficient numbers of competent, dedicated teachers; and teachers are the prime factor in educational qualities."

The Salary Supplement Act, so-called, permits certain teachers in non-public elementary schools who meet the requirements of the Act to apply for and receive a supplement to their salary. The Act requires that a teacher to qualify for the salary supplement must be certified to teach by the State Board of Education; must teach in a non-public elementary school in which the per capita cost per pupil is no greater than the cost per pupil in a public elementary school; must teach only secular subjects to the same extent as taught in public schools; must use only teaching materials used in the public schools and must not teach a course in religion and signs a statement not to do

so during any period for which a salary supplement is received.

Under the Act payments must be made directly to the teacher and not through the agency of the school.

The amount of the authorized salary supplement is fifteen (15%) percent of the current salary which, including the supplement, is not in excess of the average maximum salary paid to public school teachers in the State.

No non-public school is required to come within the provisions of the Act.

No teacher in a non-public school is required to comply with the Act. Compliance for non-public schools and for non-public school teachers is purely voluntary.

The case was heard on the merits and substantial evidence in the form of oral testimony, depositions and documents was introduced.

The essence of the argument presented by the Appellees was that the Establishment Clause prohibits the use of any public funds which may indirectly benefit a parochial school because such schools have a religious atmosphere and any such indirect aid would have the effect of advancing religion.

The essence of the argument presented by the Appellants was that public funds may be used where the subsidized activity is purely secular, serves a public purpose and is consistent with the secular purpose of the Act.

The majority of the court below purported to apply the purpose and effect test developed in *Abington School District* v. *Schempp,* 374 U.S. 203, 223 (1960),

relied on in *Board of Education* v. *Allen,* 392 U.S. 236 at 245-247 (1968) and refined in *Walz* v. *Tax Commission of New York City,* 397 U.S. 664 (1970).

The court, however, felt that *Walz, supra,* modified the primary effect test of *Allen, supra,* by concluding that in determining the primary effect of a Statute it was only necessary to determine whether or not a Statute resulted in excessive entanglement between government and religion. Both the majority and the separate concurring Opinion concluded that while the Act had a primary secular purpose its end result was excessive entanglement between government and religion.

## SUMMARY OF ARGUMENT

Appellants agree with the District Court's ruling that the Salary Supplement Act had a purely secular purpose. Appellants contend that the District Court was in error in its reading of the Decision in *Walz* v. *Tax Commission of New York City,* 397 U.S. 664 (1970), and further in error in its application of the proper constitutional test to the evidence in the instant case.

Appellants contend that the *Schempp, Allen, Walz* test to determine whether or not a State Statute violates the Establishment Clause of the First Amendment of the United States Constitution is a three-fold test; viz:

1. Is the purpose of the Statute secular?

2. Is the primary effect of the Statute to advance religion?

3. Is the primary effect of the Statute to inhibit religion?

A fair reading of the Statute and the application of the evidence to the test indicates conclusively that the Salary Supplement Act satisfies the constitutional safeguards required for Establishment Clause purposes.

## ARGUMENT

### I. THE RHODE ISLAND SALARY SUPPLEMENT ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

#### A. The Crisis Leading to the Statute

The presence before this Court of *Tilton, et al.* v. *Richardson,* No. 153, October Term, 1970, *Lemon, et al.* v. *Kurtzman,* No. 89, October Term, 1970, *Earley, et al.* v. *DiCenso,* No. 569, October Term, 1970, and *Robinson, et al.* v. *DiCenso,* No. 570, October Term, 1970, indicates the existing crisis in the field of non-public education.

The presence of these cases does more. It means that the crisis is felt throughout the country and at every level of government. It means that the State and Federal governments have responded to the crisis. It means most of all that this Court recognizes the crisis and is willing to come to grips with it.

The last quarter century has brought vast change to these United States. We entered the Nuclear age, we communicate with nations via satellite and men walk on the moon. Government presence in the fields of housing, employment and medical care has become immense. Government spending has increased fantastically. Taxes have increased in amount, in multiplicity and in complexity.

The change has been evidenced in all phases of living. Nowhere has the change been felt more keenly than in the field of education. The population ex-

ploded. More children meant more schools and more teachers. Scientific advances brought new learning. The new learning required new methods, new teachers, new equipment. The new teachers with the new methods are scarce, and the new equipment is sophisticated and expensive. Physical facilities are inadequate and expensive. The cost of education has ballooned.

The crisis in education has affected both public and non-public schools. Both have felt the affects of spiralling costs.

The response of both the State and Federal governments indicates dramatically the magnitude of the crisis. At the Federal level in messages to Congress, President Kennedy noted the crisis at the college and university level (H.R. Doc. No. 54, 88th Cong., 1st Sess. 7 (1963), and President Nixon noted it at the elementary and secondary school levels. (H.R. Doc. No. 267, 91st Cong., 2nd Sess. 9 (1970). In his message to Congress President Nixon said:

> "If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970's would exceed four billion per year in operations with an estimated five billion more needed for facilities . . . [non-public elementary and secondary schools] have long been an integral part of the nation's educational establishment . . . supplementing our public school system. . . . . [those schools] provide . . . diversity . . . . [and] give a spur of competition to the public schools through which educational innovations come, both systems benefit and progress results. . . . . Private, elementary and secondary schools, most of them church supported . . . educate eleven (11%) percent of all pupils, close to six million school children. In the past two years close to a thousand non-public elementary and secondary schools closed and most of their dis-

> placed students enrolled in local public schools . . . these schools—non-sectarian, Catholic, Protestant, Jewish and other—often add a dimension of spiritual value giving children a moral code by which to live. . . . This government cannot be indifferent to the potential collapse of such schools . . . in its deliberations, I urge the commission to keep two considerations in mind. First, our purpose here is not to aid religion in particular but to promote diversity in education; second, that non-public schools in America are closing at the rate of one a day."

The reaction of both Congress and the State Legislatures to the crisis has been the enactment of a great variety of legislation designed to afford aid to the non-public schools.

The volume and nature of legislation is a dramatic indication not only of the existence and extent of the crisis but of the consuming desire of both the states and the nation as a whole to preserve non-public education. The response of the State of Rhode Island was the enactment of its Salary Supplement Act which is now in question.

In the passage of this Act the Rhode Island legislature was very much aware of the nature of its problem. On the one hand, it recognized the probability of the loss of its non-public elementary schools which educate twenty-five (25%) percent of its children, and on the other hand, it recognized the Constitutional prohibition of ". . . an establishment of religion . . ." That the State was aware of the Constitutional prohibition is amply evidenced in the first section of the Act:

> "It is, therefore, the policy of the State of Rhode Island to provide a quality education for all Rhode

> Island youth, those in public and non-public schools alike; *within the limitations imposed by the Constitutions of the United States and of Rhode Island.*" (R.I.G.L. 16-51-1) (Emphasis added)

That a crisis existed in Rhode Island's non-public elementary schools was a clear-cut finding of the court below:

> "The evidence introduced at trial fully corroborates the legislature's findings of a financial crisis in non-public education . . ." (J.A. 32).

The Rhode Island Salary Supplement Act represents its legislature's efforts to save its non-public school without " . . . an establishment of religion . . . ".

### B. The Constitutional Standards

In this area of interplay between state aid to non-public education and the establishment of religion, constitutional guidelines are becoming more distinct. The norm is as stated in *Walz* v. *Tax Commission,* 397 U.S. 664, 669:

> ". . . we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

All contact or involvement or entanglement between church and state is not prohibited. *Everson* v. *Board of Education,* 330 U.S. 1 (1947); *Board of Education* v. *Allen,* 392 U.S. 236 (1968). The test that has emerged is the *purpose* and *primary effect* test developed in *Abington School District* v. *Schempp,* 374

U.S. 203, relied on in *Allen, supra,* and further developed in *Walz, supra.*

In *Allen, supra,* this Court has said

> ". . . to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 392 U.S. at 243.

In *Walz, supra,* this Court stated:

> "Determining that the legislative *purpose* is not aimed at establishing, sponsoring or supporting religion does not end the inquiry, however. We must also be sure that the end result—*the effect* —is not an *excessive* government entanglement with religion. The test is inescapably one of degree." 397 U.S. at 674.

The test or standard that has emerged is three-fold, viz: (1) Is the purpose of the Statute secular? (2) Is the primary effect of the Statute the advancement of religion? (3) Is the primary effect of the Statute the inhibition of religion?

In the development of the *Schempp-Allen-Walz* test of secular purpose and primary effect this Court not only produced an eminently viable and practical formula but also one which echoed the wisdom of an earlier Court announced by Mr. Justice Holmes:

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas and Tenn. Railroad* v. *May,* 194 U.S. 267, 270 (1904).

It is against this purpose and primary effect test that the Rhode Island Salary Supplement Act must be measured to determine whether or not it passes constitutional muster.

### C. The Purpose of the Statute Is Secular

The purpose of the Rhode Island Salary Supplement Act is very clearly and very simply set forth in the first section of the Act. Its purpose is to provide ". . . a quality education for all Rhode Island youth, those in public and non-public schools alike. . . ." After reciting that approximately twenty-five (25%) percent of all elementary school children in Rhode Island are in non-public schools, it states that ". . . non-public schools are finding it increasingly difficult to maintain their traditional quality due to rising costs. This is particularly serious with regard to the salaries of teachers; without adequate salary scales, no school can attract sufficient numbers of competent dedicated teachers; and teachers are the prime factor in educational quality . . . in order to assist non-public schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized standards of quality we hereby enact. . . ."

The quality of education is a legitimate legislative concern. *Board of Education* v. *Allen,* 392 U.S. at 245-247. The ". . . specific statement of primary purpose in the act governs." *Arizona* v. *California,* 283 U.S. 423, 456 (1931); see *McGowan* v. *Maryland,* 366 U.S. 420 (1961). The transcript is devoid of evidence indicating a contrary purpose. The court below concluded after citing the purpose and effect test set forth in *Schempp, supra,* and relied on in *Allen, supra:*

> ". . . the Salary Supplement Act, in our opinion, was not intended to advance or interfere with re-

> ligion. The Statute itself recites that its purpose is 'to provide a quality education for all Rhode Island youth, those in public and non-public schools alike.' Certainly the quality of education in non-public schools is a legitimate legislative concern . . . we find nothing in the history and structure of the act which suggests that the legislative purpose was other than as declared." (J.A. 39)

It would seem clear that the purpose of the Act is secular and was not intended to advance or inhibit religion and hence meets the Constitutional standard of secular purpose required by the *Schempp-Allen-Walz* test.

**D. The Primary Effect of the Statute Does Not Advance Religion**

The court below refused to determine the "primary effect" of the Salary Supplement Act.

> ". . . the act has two significant effects: on the one hand, it aids the quality of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is 'the primary' effect, as *Schempp* seems to require, are likely to be no more satisfactory than efforts to rank the legs of a table in order of importance." (J.A. 40)

The court below felt that *Walz, supra,* did away with the primary effect test of *Schempp* and *Allen* and concluded that the "degree of entanglement" determines whether the "primary effect" of the statute violates the Establishment Clause.

> "*Walz* thus makes it clear that the test of the statute's effect is not whether the secular result is more important than the religious result or

> whether the activity aided is in form secular, but whether the degree of entanglement required by the statute is likely to promote the substantive evils against which the First Amendment guards." (J.A. 42)

It is respectfully submitted that the court below misconstrued the *Walz* decision. *Walz* as read by your appellants adds a new dimension to the *Schempp-Allen* test. *Allen* was concerned with whether or not the statute in question had the effect of *advancing* religion.

> "Supplying of costly teaching materials was not seen either as manifesting a legislative purpose to aid or as having a primary effect of *aid* contravening the First Amendment." 397 U.S. at 672. (Emphasis added)

*Walz* was concerned with whether or not the statute in question had the effect of *inhibiting* religion.

> "New York in common with other states, has determined that certain entities that exist in harmonious relationship to the community at large and that foster its 'moral or mental improvement' should not be *inhibited* in their activities by property taxation." 397 U.S. at 672. (Emphasis added)

This court in *Walz* concluded that if the end result of the Statute was an excessive government entanglement with religion, then it would be felt to *inhibit* religion.

The test of whether the primary effect of a Statute *advances* or *inhibits* religion still prevails and has not been modified by *Walz* as thought by the court below. As earlier indicated in this brief, your appellants conceive the Establishment Clause test of the constitutionality of a Statute to be a three-fold analysis, viz:

(1) Is the purpose secular? (2) Is the primary effect to *advance* religion? (3) Is the primary effect to *inhibit* religion?

The secular purpose of the Salary Supplement Act has been earlier dealt with in this brief. For purposes of clarity and convenience this portion of the appellants brief will concern itself only with that portion of the primary effect test pertaining to the *advancement* of religion. The *inhibition* phase of the test will be treated separately.

Implicit in a determination of the "primary effect" of a statute is the concept that a statute may well produce multiple effects. The problem of determining which of several effects is *primary* may well be difficult but in passing upon the constitutionality of the Salary Supplement Act it was the duty of the court below to determine the Act's *primary* effect.

> ". . . it is an essential part of adjudication to draw distinctions, including fine ones, in the process of interpreting the Constitution." *Walz, supra,* 397 U.S. at 679.

For Establishment Clause purposes, the guidelines for determining whether or not a State Statute with a secular purpose has the primary effect of advancing religion have been set. In *Allen, supra,* providing textbooks to students in parochial schools had the effect of aiding the church which sponsored the school, as well as having the effect of aiding secular education. One effect was clearly "secular" and one effect was clearly "religious". In determining which of these two effects was the primary effect for Establishment Clause purposes, this Court concluded that absent evidence of religious "permeation" the secular effect if

consistent with the Act's secular purpose would be considered the primary effect.

The court below found that the Salary Supplement Act had a purely secular purpose and

> ". . . two significant effects: on the one hand, it aids the quality of secular education; on the other it provides support to a religious enterprise." (J.A. 40)

This was precisely the situation facing this Court in *Allen, supra,* and the trial court should have made a determination of whether the secular or the religious effect was the primary effect for Establishment Clause purposes.

In making this determination of whether the secular or religious effect was primary, the court below should have based its conclusion on the evidence. It was not handicapped by a "meager" record as was this Court in *Allen, supra.* The record was ample. It had only to determine whether or not the public funds had the effect of supporting a purely secular activity or an activity permeated with religion. If the evidence indicated permeation, then the Statute's primary effect would be the advancement of religion. If the evidence indicated a purely secular activity, then the primary effect of the statute would be secular.

The court below made extensive findings of fact based upon substantial evidence in the form of depositions, documentary evidence and the oral testimony of an Associate Commissioner of Education for the State of Rhode Island, the Superintendent of Schools for the Archdiocese of Providence and several teachers in parochial schools eligible for aid under the statute. It also extensively reviewed the evidence.

The evidence indicated a ". . . financial crisis in non-public education . . ." stemming from ". . . the rapidly changing composition of their faculties." (J.A. 32); that Rhode Island's Catholic elementary schools are ". . . under the general supervision of the Bishop of Providence . . ."; that the ground rules for principals of those schools are set forth in a ". . . Handbook of School Regulations . . . frequently superseded either by informal directive or by common practice." (J.A. 34); that the keynote of education in a parochial school as reflected in the Handbook is ". . . the spirit and personality as well as the professional competence of the teacher . . ." (J.A. 35) The evidence further indicated that "this concern for religious values does not necessarily affect the content of secular subjects in diocesan schools"; that ". . . several teachers testified that they did not inject religion into their secular classes and that such testimony gained added credibility from the fact that several of the teachers were non-Catholics . . ."; and the Salary Supplement Act as well as the Rhode Island Textbook Loan laws required that the teaching materials be those approved for use in public schools. (J.A. 35)

The court noted that the evidence showed that parochial schools were usually located near the parish church; that there were religious symbols on the exterior and interior of buildings; that prayers were said and that religious vocations were encouraged; that it was advantageous to the church to have a curriculum which contained both religious and secular subjects; that the presence of Sisters provided a religious atmosphere; that while religion did not overtly intrude into all instruction the blend of secular and religious activity makes the parochial school a power-

ful vehicle for transmitting the Catholic faith to the next generation. (J.A. 35, 36) The court further noted:

> "It also seems clear to us that this essentially religious enterprise (*parochial schools*) cannot succeed without good teaching in secular subjects . . ." ". . . good secular teaching is as essential to the religious mission of the parochial schools as a roof for the school or desks for the classrooms." (J.A. 36, 37) (Italicized words added)

It is undoubtedly true that paying a part of the salary of teachers who teach secular subjects with secular materials in church schools indirectly aids

> ". . . that particular religion to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age. No religious body that maintains schools would deny this as an affirmative if not dominant policy of church schools." 392 U.S. at 671.

But it is equally true that for Establishment Clause purposes all aid is not prohibited. As this Court said in *Walz* at 671-672:

> ". . . making textbooks available to pupils in parochial schools in common with public schools is surely an 'aid' to the sponsoring churches because it relieved those churches of an enormous aggregate cost . . . was not seen as having a primary effect of aid contravening the First Amendment." *Board of Education* v. *Allen,* 392 U.S. 236 (1968).

The test of the constitutionality of this Act is not whether it provides "aid" to a religious school. The test is to determine whether its primary effect is to advance religion or advance education. The purpose of the Act is entirely secular. The Act had two effects:

one secular in that it aided education; the other that it indirectly aided parochial schools. If the secular effect carries out the Act's secular purpose and is not permeated with religion then the primary effect of the Act will be the advancement of education and not religion and will meet the constitutional requirements. The evidence in the record will be determinative. *Allen, supra,* at p. 248.

For purposes of determining whether this statute has the primary effect of *advancing religion* or *advancing education* the evidence is overwhelming.

The evidence stands alone and uncontradicted that the effect of the Act carried out its purpose. A significant improvement in the quality of teachers was its immediate effect. (J.A. 88) That the evidence indicated that parochial schools have religious symbols, represent a vehicle for transmitting a particular faith and that good secular teaching is an essential part of a religious enterprise, is not of itself critical to this inquiry.

This Court has long been aware that parochial schools pursue two goals.

> ". . . this court has long recognized that religious schools pursue two goals, religious instruction and secular education." *Allen, supra,* at p. 245.

What is critical to this inquiry is whether or not the evidence shows that the activity supported by public funds is permeated by religion.

The majority of the court below was overly modest in pointing out that

> ". . . this concern for religious values does not necessarily affect the content of secular subjects

> in diocesan schools . . . [or that] several teachers testified . . . they did not inject religion into their secular classes . . ." (J.A. 35)

Judge Pettine in his separate concurring Opinion was far more accurate.

> "I read *Allen* to invite the inquiry whether the state program under scrutiny has as its effect the advancement of a religion. In answering that inquiry it cannot be presumed that secular aspects of the educational process are permeated by religious values emanating from the climate of the educational environment. Only proof will establish that subsidization of an educational enterprise is subsidization of a 'religious enterprise.' In the instant case not only is *the record barren of any proof* that the teaching of secular subject matter is a 'religious enterprise', but also there is *unanimous unrebutted* testimony from several teachers of secular subjects in Roman Catholic schools that religion does not enter into their teaching processes." (J.A. 49) (Emphasis added)

The evidence is uncontradicted that the effect of the Act was to improve the quality of education which was its stated and proven purpose.

To paraphrase the language of this Court in *Allen, supra,* at page 248, there is nothing in the record to support the proposition that the teachers receiving the salary supplement under this Act are teaching religion or injecting religion into their teaching of a secular subject. All the evidence is to the contrary.

The primary effect of this Act as established by the evidence is the advancement of quality education and not the advancement of religion.

## II. THE SALARY SUPPLEMENT ACT DOES NOT INVOLVE EXCESSIVE ENTANGLEMENT BETWEEN CHURCH AND STATE

As earlier indicated in this brief your appellants read *Walz* to mean that even if the purpose of a Statute is secular and its primary effect does not *advance* religion it may still violate the First Amendment by *inhibiting* religion if its end result is an ". . . excessive government entanglement with religion". 397 U.S. at 674.

The court below held that the Salary Supplement Act resulted in excessive government entanglement with religion and thus violated the First Amendment.

While *Walz* makes it clear that *excessive* entanglement between government and religion is prohibited by the First Amendment, it also makes it clear that

> ". . . no perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one which seeks to mark boundaries to avoid excessive entanglement." 397 U.S. at 670.

The test is not one of entanglement between government and religion but rather one of *excessive* entanglement and such a test ". . . is inescapably one of degree." 397 U.S. at 674. It is on the *degree* of entanglement between church and state resulting from the Salary Supplement Act that attention must be focused to determine its constitutionality.

Private schools and parochial schools in particular have long been a part of the educational fabric of the United States. For an equally long period of time it has been recognized that such schools must meet the secular educational requirements as to the *quality* and nature of curriculum which the State has

power to impose. *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). Rhode Island, like its sister states, has long been concerned with the quality of the education of its people and the quality of education in private schools is a legitimate public concern. *Cochran* v. *Louisiana State Board of Education,* 281 U.S. 370 (1930). There can be little doubt that it is within the power of the state

> ". . . to insist that attendance at private schools . . . be at institutions which provide minimum hours of instruction, employ teachers of specified training and cover prescribed subjects of instruction." *Allen, supra,* 392 U.S. at 245-246.

The "entanglement" between the religious school and state control has been long and fruitful. *Allen, supra,* 392 U.S. at 247-48.

Rhode Island, like its sister states, has a myriad of "entanglements" with private schools. A parochial school's very existence is controlled by the state. No parochial school can exist without first being approved by the local School Committee. (Rhode Island General Laws, 1956 §§ 16-19-2 and 16-40-1) Its curriculum and attendance are regulated, and extensive reporting to public officials is required by Statute. (16-19-2) (16-22-2) Its participation in the school lunch program (16-8-7, 9, 11); the textbook program (16-23-2); and the bus program (16-21-2) are regulated by Statutes. Its physical facilities (16-21-3); its health programs (16-21-7) and its safety standards are all regulated. (16-21-4)

All of these laws require a more or less continuing administrative involvement or entanglement between parochial school authorities and the State.

Many of these laws require the exercise of a most delicate discretion on the part of government officials and parochial school authorities. Certainly the discretion exercised in determining that a parochial school may exist at all involves great discretion and potentially great entanglement. In reaching such a decision the local School Committee must make a "value" judgment that such school teaches subjects

> ". . . substantially to the same extent as such subjects are required to be taught in the public schools and that the teaching . . . shall be *thorough* and *efficient*; . . ." (16-19-2)

No one has seriously questioned the power of the State to create this potentially great entanglement between government and religion. No one has seriously questioned that such a law on its face creates an *excessive entanglement* which inhibits religion to a degree prohibited by the First Amendment.

This is equally true of the laws respecting such schools' curricula, physical facilities, safety programs, health programs, bussing, school lunches, compulsory attendance.

In Rhode Island, at least, the existence of most of these relationships or entanglements has been of long duration and totally free of any semblance of strife, both historically and in the record of this case.

Against this background we must test the Salary Supplement Act. Not to determine whether it results in an involvement or entanglement between the state and parochial education but rather to determine whether its end result is an *entanglement* with religion to a *degree* which in the "value" judgment of this

Court is felt to be excessive and thereby an *inhibition* of religion prohibited by the First Amendment.

The court below relying on *Walz* concluded that the Salary Supplement Act resulted in ". . . excessive government entanglement with religion . . ." (J.A. 45) This conclusion was based on two premises. The first premise was that under this Statute the

> ". . . Commissioner of Education must monitor parochial school expenditures and in close cases determine which spending is 'religious' and which 'secular'. This ongoing administrative relationship between government and the Catholic schools creates the possibility of legal disputes. (J.A. 43-44)

The second premise was

> ". . . equally important . . . this statute . . . *may* significantly limit the internal freedom of parochial schools." "Already the Act has restricted the role of teachers. The evidence before us indicates that some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prayed with his class lest he endanger his subsidy.
>
> "In this very case we have been forced to inquire into . . . whether religion 'permeates' the teaching of secular subjects . . . surely such inquiries represent a substantial limitation on the freedom of parochial schools to set their own curriculum." (J.A. 44) (Emphasis added)

These two premises on which the court below reached its conclusion of excessive entanglement can be fairly stated to be, first, that the Commissioner of Education must determine the amount spent on "secular" as opposed to "religious" education and, second, that

the Act limits the freedom of the parochial school to set its curriculum and the freedom of parochial school teachers to teach religion. In considering the validity of these two premises we must look to the Act and look to the evidence.

The court's first premise results from the fact that under the Act otherwise qualified teachers can apply for a salary supplement *only* if they teach in a non-public school. The Act defines a non-public school to be

> ". . . any school not operated for profit other than a public school . . . except . . . schools whose annual per student expenditure for secular education equals or exceeds the average annual per student expenditure in the public schools . . . as determined by the Commissioner of Education." (16-51-2)

The trial court concluded that this language required that the Commissioner of Education *monitor* parochial school expenditures and in close cases determine which spending is "religious" and which "secular" and that this produced an ongoing administrative relationship between church and state which creates in the words of the court the *possibility* of legal disputes. The court had earlier voiced a concern for determining which expenses are "religious" and which "secular" when it said:

> ". . . sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to 'secular' activities." (J.A. 41)

This reference to *sophisticated* bookkeeping permitting the bulk of a parochial school's expenses being

assigned to "secular" activities is totally irrelevant to this inquiry and entirely misleading. Under the Act in question the exact opposite would have to occur. The bulk of an institution's expenses would have to be assigned to "religious" activities or the per student cost of "secular" education in a parochial school would exceed the per student cost of the public school and thereby disqualify the teacher in such school from receiving the supplement.

The lower court's conclusion that the Act requires the "monitoring" of a parochial school's expenditures, if not erroneous, is, at least, unfortunate. It implies a week-to-week or month-to-month surveillance. The determination to be made under this Act is *annual.* Teachers are hired on an *annual* basis. The so-called ongoing administrative relationship between church and state referred to by the court below is an annual one. In this regard it is a no more frequent or more ongoing relationship than that created by the laws pertaining to compulsory attendance and curriculum and far less than that created by the laws pertaining to the health, safety, busses and lunches. To that extent the *degree* of entanglement created by this Act is modest.

The Act does require that the Commissioner of Education determine the cost of "secular" education. The cost of "secular" education is well known to the staff of the Commissioner of Education in Rhode Island. The State has long paid to its cities and towns a percentage of their operating costs of education and accounting methods and procedures for determining costs are well established. (Rhode Island General Laws §§ 16-7-1 through 47). The annual per student cost of education is published annually. (PROVIDENCE JOURNAL

BULLETIN Almanac 1970 at page 169). When it is also noted that present laws regulate to a great extent the number of school days and the quality, quantity and content of the private school's curriculum the area for potential dispute as to cost is narrow indeed.

It is of importance to note that the Commissioner of Education is not required to make a *determination* of cost in *every* case. Only if the total per student cost of both the "secular" and "religious" education exceeds the public school per student cost is a determination necessary. If the private school per student cost for both "secular" and "religious" education is *equal to or less* than that of the public school no determination is necessary.

Looking then to the Act in its actual operation the Commissioner of Education has only once had to inquire as to the allocation of expenses and there is no indication of any more such future determinations. The court below found:

> "To date this final breakdown into secular and religious expenses has proved necessary in only one case. Only two non-public schools have reported expenditures in excess of the statutory norm, and teachers at one of these schools failed to apply for aid, thus obviating the need for further inquiry." (J.A. 31-32)

Based on the evidence and this finding the first premise on which the court based its conclusion that the determination of the per student cost of secular education resulted in "monitoring" parochial school expenditures, created an "ongoing" administrative relationship and the *possibility* of legal disputes to a *degree* constituting excessive entanglement is totally without foundation.

There is no reason either in the record of this case or otherwise to assume that either the parochial school Administrator or the Commissioner of Education will not honestly administer this Act or that the Commissioner with competent accounting advice cannot readily resolve any religious-secular expense question that may "possibly" arise in the future by appropriate regulation.

The first premise of the court below lacks support in the evidence, experience and in probability.

The second premise on which the court below based its conclusion of "excessive entanglement" was that this Statute

> "... *may* ... significantly limit the internal freedom of parochial schools ... already the Act has restricted the role of teachers. The evidence before us indicates that some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prayed with his class lest he endanger his subsidy ... In this very case we have been forced to inquire ... into whether religion 'permeates' the teaching of secular subjects ... surely such inquiries represent a substantial limitation on the freedom of parochial schools to set their curriculum." (J.A. 44)

It is obvious from the foregoing that the lower court read this Act as imposing a limitation on the freedom of parochial schools to set their curriculum and the freedom of teachers in these schools to teach religion.

Relative to the curriculum it is worthy to note that the court used the word "may". There is absolutely no evidence that parochial schools have altered their curriculum so as to comply with the Act. There is no

evidence that any parochial school person felt that this Act imposed any such limitation on its curriculum. There is not even a hint in the evidence that this Act will require or result in a change of curriculum. Having in mind the compulsory curriculum required presently by Rhode Island law, any alteration of curriculum could only be of a minor nature even if it were imposed.

Looking to the Act itself it is immediately apparent that the Act is completely voluntary. It is directly concerned with teachers and only indirectly with schools. The relationships resulting from the Act are between teachers and the Commissioner of Education. The school is involved only to the extent that its per student cost for secular education is equal to or less than such cost in a public school. There is nothing in the Act which requires a school to tailor its expenses to qualify under the Act. There is nothing in the Act which requires a school to hire only teachers who will not teach religion or inject it into secular subject matter. There is nothing in the Act which requires the school to qualify at all. The school is left entirely free to set its own curriculum and to hire its own teachers.

There is absolutely nothing contained in the Act itself and nothing in the evidence which indicates the slightest restriction on the curriculum of a parochial school.

The Salary Supplement Act does impose a "restriction" on a participating teacher. Such a teacher cannot teach religion while receiving benefits under the Act. This is the only "restriction" it contains. Contracts to teach in a parochial school are made as they always have been; between the teacher and the school

authority. No teacher is required to teach in a parochial school. No teacher in a parochial school is prevented from teaching religion. No teacher in a parochial school is required, even if otherwise qualified, to apply for a salary supplement. Both the qualifying for and the applying for the salary supplement is completely voluntary and unrestricted.

The "restriction" imposed by the Act is simple and reasonable. If a teacher in a qualified school wishes to receive the Act's benefits he must teach a subject as taught and with the materials used in a public school and must sign a statement not to teach a course in religion while receiving the supplement.

A fair reading of the Act as it applies to teachers indicates that it does not contain "restrictions" but rather *conditions*. No one need come under the Act. The decision to comply with the Act is the free and independent choice of each individual teacher.

In noting that the evidence showed that one teacher had stopped praying with his class and that some otherwise qualified teachers had stopped teaching religion the court below was identifying the tree and not the forest. It failed to realize that these teachers had *voluntarily* chosen to do this. They were not *required* to do this. In considering the Act in its operating effect on teachers it should have shown a greater concern that the evidence in the record had the immediate effect of having more *quality* teachers applying for positions and that several of the teachers who testified were teachers in Roman Catholic schools who were themselves not Roman Catholics.

There is no support in a fair reading of the Act or in the evidence that a parochial school's curriculum is

"restricted" or that a parochial school teacher is "restricted" by this Act.

Both premises on which the court below based its conclusion of excessive entanglement are entirely unsupported by the Act itself, by the evidence and by reasonable probability. The degree of involvement between church and state arising under this Act is minimal; the Act imposes no restriction on the religious freedom of a parochial school to set its curriculum or on a parochial school teacher to teach religion.

There is no "excessive entanglement" between government and religion created by the Salary Supplement Act.

### III. THE RHODE ISLAND SALARY SUPPLEMENT ACT DOES NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

In their complaint Appellees allege that the Salary Supplement Act amounted to

> "... compulsory taxation for the support of religion or religious educational institutions." (Complaint, ¶ 21, J.A. 8, 20-21)

The District Court rejected this claim because Appellees

> "... failed to introduce the kind of particularized evidence necessary ... to support this allegation." (J.A. 37-38)

The transcript was void of any evidence to show that the Appellees practiced any religion let alone that they were coerced in the practice of a religion. Such a show of coercion is necessary to establish a violation

of the free exercise clause. *Abington School District* v. *Schempp,* 374 U.S. 203-223 (1960).

In addition to this the evidence clearly establishes that the Salary Supplement Act has the primary effect of benefiting the quality of education in non-public elementary schools.

## CONCLUSION

The Rhode Island Salary Supplement Act has the secular purpose of aiding secular education, a primary effect of aiding secular education does not result in excessive entanglement between government and religion and coerces no one.

The decision of the District Court must be reversed.

Respectfully submitted,

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